Michigan Law Review

Volume 109 | Issue 2

2010

The Right Issue, the Wrong Branch: Arguments against Adjudicating Climate Change Nuisance Claims

Matthew Edwin Miller
University of Michigan Law School

NOTE

THE RIGHT ISSUE, THE WRONG BRANCH: ARGUMENTS AGAINST ADJUDICATING CLIMATE CHANGE NUISANCE CLAIMS

*Matthew Edwin Miller**

Climate change is probably today's greatest global environmental threat, posing dire ecological, economic, and humanitarian consequences. In the absence of a comprehensive regulatory scheme to address the problem, some aggrieved Americans have sought relief from climate-related injuries by suing significant emitters of greenhouse gases under a public nuisance theory. Federal district courts have dismissed four such claims, with each court relying at least in part on the political question doctrine of nonjusticiability. However, one circuit court of appeals has reversed to date, finding that the common law cognizes such claims and that the judiciary is competent and compelled to adjudicate them.

This Note argues that courts should dismiss climate-related public nuisance suits—at least those that seek injunctive caps on greenhouse gas emissions. Focusing on Connecticut v. American Electric Power Co. *as a case in point, this Note concludes that such claims should be deemed nonjusticiable political questions or, alternatively, should be dismissed for lack of redressability. As an afterthought, the Note also briefly acknowledges some problems that could arise on the merits of this category of claims, along with policy concerns about permitting such litigation.*

TABLE OF CONTENTS

---

* J.D. Candidate, May 2011. I am grateful to my editors, Nicole Dunn, Dina McLeod, and Kyle Aarons, along with the rest of the Volume 109 Notes Office of the *Michigan Law Review*, for their hard work and insightful critiques. Special thanks also to Professor David Uhlmann for his guidance with this Note and, more broadly, for his mentorship of me and other aspiring environmental lawyers. Finally, I thank my family and friends for their constant support.

INTRODUCTION

The time has passed for debating whether climate change is a problem. After years of skepticism, the scientific consensus tells us that global warming poses a grave threat to the natural environment as well as to human health and welfare around the globe.[1] Although climate change is a complex phenomenon with natural contributing factors, the most significant cause of the current warming trend is the combustion of fossil fuels (oil, coal, and natural gas), which releases gases that amplify the greenhouse effect in Earth's atmosphere.[2] The aggregation of ecological, economic, and social

1. *See generally* Intergovernmental Panel on Climate Change [IPCC], *Climate Change 2007: Synthesis Report*, at 2 (2008) [hereinafter IPCC, *Synthesis Report*], *available at* http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_synthesis_report.htm ("Observational evidence from all continents and most oceans shows that many natural systems are being affected by regional climate changes, particularly temperature increases."); *id.* at 3 (noting "other effects" on "agricultural and forestry management," "heat related mortality," "infectious disease vectors," "hunting and travel over snow and ice," and "mountain sports"). The Intergovernmental Panel on Climate Change ("IPCC") is a panel sponsored jointly by the United Nations and the World Meteorological Organization ("WMO") whose publications represent the work and ultimate conservative consensus of thousands of scientists and policymakers worldwide. IPCC, Organization, http://www.ipcc.ch/organization/organization.htm (last visited Aug. 16, 2010). Co-winner of the 2007 Nobel Peace Prize, IPCC, *Synthesis Report*, *supra* at ii, the IPCC is considered a comprehensive, objective voice on climate change science and policy, *see, e.g.*, Envtl. Prot. Agency, 2007 Intergovernmental Panel on Climate Change Assessment Reports, http://www.epa.gov/climatechange/ipcc2007.html (last visited Aug. 16, 2010).

2. IPCC, *Synthesis Report*, *supra* note 1, at 36–41. Examples of natural contributing factors include shifts in the eccentricity of Earth's orbit and in the tilt of its axis, solar flares, oceanic cycles, and volcanic activity. IPCC, *Climate Change 2007: The Physical Science Basis*, at 673–703 (2007) [hereinafter IPCC, *Physical Science Basis*], *available at* http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_wg1_report_the_physical_science_basis.htm. Spurred

harms attributable to the accelerating warming of the globe is frightening, worsening, and multifarious.[3] Yet notwithstanding the urgency of the problem, nations of the world do not agree about legal and economic mechanisms for mitigating or adapting to climate change.

In the United States, the absence of statutory regulation of greenhouse gas ("GHG") emissions has prompted some injured parties to seek redress via litigation through the common law tort of public nuisance.[4] These plaintiffs allege that emissions generated by power plants, oil and gas companies, and other corporations have harmed them by exacerbating the greenhouse effect, thereby contributing to injuries that result from global warming. Federal district courts have refused to entertain such suits, justifying dismissal on political question grounds—reasoning that adjudication is beyond the purview of the judiciary—and sometimes on standing grounds as well.[5] On the other hand, the Court of Appeals for the Second Circuit,[6] along with several scholars,[7] agree that courts can adjudicate climate change tort claims.

---

chiefly by the continuing, unprecedented spike in greenhouse gas emissions (most significantly carbon dioxide), average global temperature is projected to rise approximately 1.8°C–4.0°C over the twenty-first century (relative to the 1980–1999 average). IPCC, *Synthesis Report*, *supra* note 1, at 36–45.

3. *See* IPCC, *Synthesis Report*, *supra* note 1, at 30–33, 48–54. Some harms to the environment and human welfare include the melting of ice caps and snowpacks, which leads to elevated sea levels and coastal land loss as well as fresh-water shortages; droughts in some places and flooding in others; stronger and more frequent extreme weather events; species displacement and extinction; and increased malaria-related death rates. *Id.* With respect to economic harms, it has been estimated that by 2050 the costs of global warming will reach $500 billion, given decreased agricultural and fishing productivity, increased storm damages, and lost coastal real estate. TIM FLANNERY, THE WEATHER MAKERS: HOW MAN IS CHANGING THE CLIMATE AND WHAT IT MEANS FOR LIFE ON EARTH 236 (international ed. 2005). This figure does not incorporate economic losses resulting from climate-change-related deaths.

4. A public nuisance is defined as an unreasonable interference with a common right of the general public. RESTATEMENT (SECOND) OF TORTS § 821B (1979); *see also infra* note 78 (identifying factors for evaluating reasonableness in the public nuisance context).

5. Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009) (political question and standing); California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (political question); Comer v. Murphy Oil USA, Inc., No. 1:05-CV-436-LG-RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007) (political question and standing), *rev'd* 585 F.3d 855 (5th Cir. 2009), *reh'g en banc granted*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010) (dismissing for lack of quorum); Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 267–68 (S.D.N.Y. 2005) (political question), *rev'd*, 582 F.3d 309 (2d Cir. 2009); *see infra* notes 24–26 regarding *Kivalina*, *Comer*, and *American Electric Power*.

6. *Am. Elec. Power*, 582 F.3d at 392. Notably, a three judge panel of the Fifth Circuit similarly reversed the dismissal of *Comer* shortly after the Second Circuit reversed and remanded *American Electric Power*. However, the Fifth Circuit subsequently decided to rehear the appeal en banc, thereby vacating the panel's reversal. After that, but before the circuit could rehear the case, an additional circuit judge recused himself, leaving the court without a quorum to conduct further proceedings. As such, the *Comer* appeal was dismissed by the Fifth Circuit, the district court's decision became "good law" once again, and the *Comer* plaintiffs were given leave to appeal their case to the US Supreme Court. Comer v. Murphy Oil USA, Inc., No. 07-60756, 2010 WL 2136658 (5th Cir. May 28, 2010).

7. *E.g.*, Randall S. Abate, *Automobile Emissions and Climate Change Impacts: Employing Public Nuisance Doctrine as Part of a "Global Warming Solution" in California*, 40 CONN. L. REV. 591 (2008); Jonathan Zasloff, *The Judicial Carbon Tax: Reconstructing Public Nuisance and Climate Change*, 55 UCLA L. REV. 1827 (2008); Erin Casper Borissov, Note, *Global Warming: A*

In considering the viability of climate change tort litigation, this Note examines public nuisance suits that seek an injunctive emissions cap, as opposed to monetary damages, for a remedy. It focuses on injunctive suits because *Connecticut v. American Electric Power Co.*—the earliest, most far-reaching climate nuisance claim now pending—uniquely contemplates such relief, and because different arguments would apply to suits for damages.[8] This Note argues that, in light of problems with justiciability and standing, courts should dismiss injunctive climate nuisance suits like *American Electric Power*.[9]

Part I of this Note outlines the current legal regime with regard to climate change, providing context for *American Electric Power* and the Second Circuit's reversal of the district court's dismissal of the case. Part II introduces the political question doctrine of nonjusticiability, explains its relevance to *American Electric Power*, and argues that the doctrine should extend to that case. Courts have not previously held that public nuisance claims present political questions. Nonetheless, the doctrine's articulation permits such an extension in cases like *American Electric Power*, and its basic purpose behooves it. Part III examines another potential bar to suit, the constitutional standing requirement of redressability, and argues that the court should have dismissed on this ground in the alternative. Finally, the Conclusion identifies some problems that may arise on the merits of suits like *American Electric Power* if they are found justiciable and redressable. It also notes some policy considerations that further challenge the wisdom of permitting such litigation.

I. CLIMATE CHANGE POLITICS AND LAW GENERALLY

On the global level, governments and international organizations have taken some steps to mitigate climate change, but action thus far has been primarily limited to aspirational resolutions. The United Nations Framework Convention on Climate Change has sponsored three major global agree-

Questionable Use of the Political Question Doctrine, 41 IND. L. REV. 415 (2008); Shawn M. LaTourette, Note, *Global Climate Change: A Political Question?*, 40 RUTGERS L. J. 219 (2008).

8. Unfortunately, space constraints prevent this Note from addressing climate nuisance claims for damages, such as *Comer* and *Kivalina*. *See infra* notes 24–25. This Note limits its analysis to injunctive suits because that relief type is fundamental to this Note's redressability argument. *See infra* Part III. The remedy distinction is also relevant to discussions of reasonableness and initial policy determinations in political question analysis. *See infra* Part II. (Without attempting a thorough defense of the proposition that climate nuisance suits for damages should also be dismissed, this Note's political question conclusion may be read to apply similarly to that kind of suit wherever the political question arguments below—especially those regarding judicial unmanageability—do not expressly rely on the injunctive element.)

9. This Note often invokes *American Electric Power* as a convenient illustration of how the present arguments would operate in an actual lawsuit. Yet while all arguments herein apply to *American Electric Power* in particular, their reasoning is not limited to that case. Rather, the arguments apply to the category of cases that *American Electric Power* exemplifies: climate-related public nuisance suits seeking injunctive emissions caps.

ments to reduce GHG emissions. First was the Rio Earth Summit of 1990,[10] which imposed no binding obligations on signatories, followed by the Kyoto Protocol of 1997,[11] which was only minimally successful because it failed to limit the emissions of developing countries or the non-ratifying United States.[12] Greater urgency surrounded the December 2009 summit in Copenhagen, which sought to extend and improve upon the Kyoto framework,[13] set to expire in 2012. However, the accord produced by Copenhagen's 193 participating nations lacked the binding reductions pledges that many delegates and commentators had emphasized as crucial.[14]

In the United States, federal law has largely avoided the climate issue,[15] but recent steps towards GHG regulation signal that change is forthcoming. Proposals are pending in Congress to implement comprehensive energy reforms, emissions reductions, and climate change mitigation strategies.[16]

---

10. United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, *available at* http://unfccc.int/resource/docs/convkp/conveng.pdf.

11. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162, *available at* http://unfccc.int/resource/docs/convkp/kpeng.pdf.

12. *See generally Managing Planet Earth: Preservation Without Purity: From Montreal to Rio to Johannesburg: 15 Years of Environmental Accords*, N.Y. TIMES, Aug. 20, 2002, at F10. Other conferences, such as the 2007 summit in Bali, have supplemented the prior agreements. *E.g.*, United Nations Framework Convention on Climate Change, Bali, Indonesia, Dec. 3–15, 2007, *Report of the Conference of the Parties on its 13th Sess.: Bali Action Plan, Decision 1/CP.13*, U.N. Doc. FCCC/CP/2007/6/Add.1 (Mar. 14, 2008), *available at* http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf.

13. *See* Kyoto Protocol to the United Nations Framework Convention on Climate Change, *supra* note 11.

14. United Nations Framework Convention on Climate Change, Copenhagen, Denmark, Dec. 7, 2009–Dec. 19, 2009 *Report of the Conference of the Parties on its 15th Sess.: Copenhagen Accord*, Decision 2/CP.15, Mar. 30, 2010, U.N. Doc. FCCC/CP/2009/11/Add.1, *available at* http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf. Promisingly, major emitting nations agreed to limit GHGs in principle and mechanisms were put into place for providing economic aid to developing countries for clean energy as well as climate harm mitigation. However, many have lamented a lack of ambitiousness in both of those aims.

15. Current federal legislation includes only statements of purpose and programs for research. In 1990, for instance, Congress enacted the Global Change Research Act of 1990, establishing a ten-year research program for global climate issues. Pub. L. No. 101-606, 104 Stat. 3096 (codified as amended at 15 U.S.C. §§ 2931–2938 (2006)). Other research-oriented programs also exist. *E.g.*, Global Climate Change Prevention Act of 1990, Pub. L. No. 101-624, § 2402, 104 Stat. 4058, 4058–59 (codifed as amended at 7 U.S.C. § 6701 (2006)) (providing for agriculture-related climate research); Energy Policy Act of 1992, Pub. L. No. 102-486, § 1604, 106 Stat. 2776, 3002 (codified as amended at 42 U.S.C. § 13384 (2006)).

16. The House of Representatives approved the American Clean Energy and Security Act, H.R. 2454 (the "Waxman-Markey" bill) on June 26, 2009. Press Release, Representative Edward J. Markey, House Passes Historic Waxman-Markey Clean Energy Bill (June 26, 2009), *available at* http://markey.house.gov/index.php?option=com_content&task=view&id=3748&Itemid=1. A corresponding proposal, the Clean Energy Jobs and American Power Act (the "Kerry-Boxer" bill), was put forth in the Senate on September 30, 2009. Press Release, Sen. John Kerry, Boxer Introduce "Clean Energy Jobs and American Power Act" (Sept. 30, 2009), *available at* http://kerry.senate.gov/press/release/?id=67c14c1f-275b-4489-8170-99da24aa1bf1. More recently, Sen. John D. Rockefeller IV (D–W.Va.) introduced legislation to suspend regulation of GHGs by the EPA, *see infra* notes 19–21, for two years while Congress debates energy and emissions reforms. Press Release, Sen. John D. Rockefeller IV, Rockefeller Introduces Legislation to Suspend EPA Action and Protect Clean Coal State Economies (Mar. 4, 2010), *available at* http://rockefeller.senate.gov/press/record.cfm?id=322764.

Moreover, prompted by the Supreme Court's only climate change ruling to date, *Massachusetts v. EPA*,[17] the Environmental Protection Agency ("EPA") has initiated the preliminary stages of regulating greenhouse gasses under the Clean Air Act ("CAA"). In *Massachusetts*, a 5–4 majority held that the EPA was required to issue a reasoned decision, grounded in the CAA, about why it would or would not make an official finding about whether motor-vehicle GHG emissions threaten human health and welfare by contributing to climate change.[18] In December 2009, considering the issue pursuant to the CAA, the EPA made such an "endangerment" finding—a prerequisite trigger for further regulation under various sections of the statute.[19] In April 2010, the EPA promulgated, in conjunction with the Department of Transportation, stricter standards for auto emissions and fuel economy.[20] The EPA is also moving forward with emissions reporting requirements for large stationary sources of GHGs, despite the Obama Administration's preference for congressional legislation to address climate issues instead.[21] Regional, state-level, and private-market efforts to reduce emissions exist as well.[22]

In lieu of congressional or EPA emissions regulation preempting climate nuisance claims (such preemption could conceivably occur within one year), some Americans have turned to the courts to respond to climate change. To date, four public nuisance lawsuits related to climate harms have been filed in federal courts. All have been dismissed at the district level on political question or standing grounds.[23] In the fall of 2009, the Second Circuit re-

---

17. 549 U.S. 497 (2007).

18. *Id.* at 501.

19. EPA, Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009). The endangerment finding was made under Title II of the CAA, which concerns only motor vehicle emissions. However, the statutory language in other sections of the CAA is similar to that of Title II, so the EPA's endangerment finding in the motor vehicle emissions context could be extended to emissions from other sources as well. *See* NATHAN RICHARDSON, GREENHOUSE GAS REGULATION UNDER THE CLEAN AIR ACT: DOES *Chevron v. NRDC* SET THE EPA FREE? 4 (2009), http://www.rff.org/RFF/Documents/RFF-DP-09-50.pdf.

20. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) (codified in scattered parts of 40 C.F.R. and 49 C.F.R.).

21. Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. 56,260 (Oct. 30, 2009) (codified as amended in scattered parts of 40 C.F.R.); John M. Broder, *E.P.A. Proposes New Regulations on Industry Gas*, N.Y. TIMES, Oct. 1, 2009, at A1. Such regulation, if not preempted by Congress, could be completed by 2011. *See* Letter from Lisa Jackson, EPA Administrator, to Sen. John D. Rockefeller IV (Feb. 22, 2010), *available at* http://epa.gov/oar/pdfs/LPJ_letter.pdf (anticipating regulation of large stationary emissions sources by 2011 and discussing the possibility of precluding CAA regulation of GHGs if a resolution proposed by Sen. Lisa Murkowski were enacted).

22. *E.g.*, California Global Warming Solutions Act of 2006, CAL. HEALTH & SAFETY CODE § 38500 (West, Westlaw through 2009 Reg. Sess.) (outlining broad policy initiatives in California to address climate change); Chicago Climate Exchange, http://www.chicagoclimatex.com/ (last visited Aug. 16, 2010) (voluntary carbon trading market open to private and public entities); Regional Greenhouse Gas Initiative (RGGI) CO2 Budget Trading Program, http://www.rggi.org/home (last visited Aug. 16, 2010) (mandatory cap-and-trade program for power plant emissions spanning ten northeastern and mid-atlantic states).

23. *See* cases cited *supra* note 5.

versed one of those dismissals.[24] Shortly thereafter, however, the Northern District of California dismissed its second climate nuisance claim, expressly declining to follow the Second Circuit's lead in entertaining such suits.[25] *American Electric Power*, pending in the Southern District of New York after remand by the Second Circuit, is the earliest complaint, the first reversal, and the most exhaustive opinion to date. It is also unique in that it involves injunctive relief, implicates the broadest array of litigants, and includes states as plaintiffs.[26]

American Electric Power commenced in 2004 when eight states and New York City brought an action in the Southern District of New York seeking abatement of an alleged public nuisance caused by the carbon dioxide ("CO_2") emissions of five large electric utilities.[27] The plaintiffs pointed to the "clear scientific consensus" that global warming has begun, identifying greenhouse gas emissions as a significant accelerating cause.[28] According to the complaint, the defendants' annual emission of 650 million tons of CO_2 has proximately caused global-warming-related injuries such as degradation of the physical environment, loss of recreation and land use, and heightened threats to human health and welfare.[29] For these reasons, the plaintiffs sought to hold the defendants jointly and severally liable for the alleged nuisance, to cap the defendants' CO_2 emissions, and to tighten that cap by a

---

24. A three judge panel of the Fifth Circuit likewise reversed a climate nuisance dismissal, but after a rare series of procedural developments, that decision was vacated and the district court's dismissal reinstated. *See* Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

25. Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 875–76 (N.D. Cal. 2009) (disagreeing with the Second Circuit's conclusions as to the "existence of judicially discoverable or manageable standards" for resolving climate change nuisance claims); *id.* at 880 n.7 (rejecting as circular the Second Circuit's Article III standing reasoning). In *Kivalina*, an Alaskan Inuit village sued a number of energy companies for damages, alleging that the defendants' emissions catalyzed the loss of community-sustaining ice shelves. The court dismissed the federal claims as presenting a political question and for lack of standing. *Id.* at 883 (also dismissing the plaintiffs' state law claims); *see also* California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (similarly dismissing climate-change-related federal public nuisance claims against automobile makers on political question grounds and declining to exercise supplemental jurisdiction over state claims).

26. *Comer* and *Kivalina* are very important, to be sure, but are distinguishable from *American Electric Power* in several ways: (1) in both cases, the plaintiffs seek monetary damages to compensate past injuries, not injunctive relief to enjoin emissions and mitigate ongoing and future harms (which pertains to questions of judicial manageability and policy determinations as well as redressability); (2) in *Comer*, the plaintiffs are class-action individuals, not governmental entities (which could affect standing); and (3) in *Comer*, the claims are grounded in state, not federal, common law (which could bear on grounds for stating a claim as well as preemption issues). *Native Vill. of Kivalina*, 663 F. Supp. 863; Comer v. Murphy Oil USA, Inc., No. 1:05-CV-436-LG-RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007). As such, while those cases will doubtlessly have important repercussions for the climate change nuisance legal scene, an extended analysis of them is beyond the scope of this Note.

27. 406 F. Supp. 2d 265, 267–68 (S.D.N.Y. 2005). The plaintiff states are Connecticut, California, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin. The suit was later consolidated with a similar complaint filed by three land trusts. *Id.*

28. Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 314 (2d Cir. 2009).

29. *Id.* at 314–19.

specified percentage each year.[30] The district court dismissed the case as presenting a nonjusticiable political question.[31] Four years later, the Second Circuit vacated that decision and remanded the case to the district court, ruling that the political question doctrine does not bar suit, that the plaintiffs have standing, and that the plaintiffs had stated a valid claim under federal common law which was not preempted by any federal statute.[32]

II. CASES LIKE *AMERICAN ELECTRIC POWER* SHOULD BE DEEMED NONJUSTICIABLE

The political question doctrine should bar adjudication of climate change public nuisance cases—at least those that, like *American Electric Power*, contemplate injunctive emissions caps as a remedy. The judiciary cannot prudentially manage relief nor make initial policy determinations in such litigation. Instead, it is constitutionally proper for the executive branch or Congress to do so. Section II.A outlines the history of the doctrine, setting a framework for political question analysis in climate nuisance cases. Section II.B, using *American Electric Power* as a case in point, reviews the Second Circuit's political question analysis in holding that injunctive nuisance claims are justiciable. Section II.C argues that the political question doctrine plausibly extends to public nuisances and that a case like *American Electric Power* warrants dismissal because it implicates at least two political question factors.

A. *The Purpose, Development, and Articulation of the Political Question Doctrine*

The political question doctrine arises from the constitutional separation of powers.[33] The doctrine originated in *Marbury v. Madison*, in which Chief Justice Marshall held that the judiciary must refrain from deciding issues relegated to another branch of the federal government.[34] The doctrine bars courts from deciding "controversies which revolve around policy choices and value determinations constitutionally committed for resolution to . . . Congress or . . . the Executive branch,"[35] recognizing that courts are "fundamentally underequipped to formulate national policies or develop standards of conduct for matters not legal in nature."[36] The dominant considerations in evaluating potential political questions are "the appropriateness

30. *Id.* at 318.

31. *Am. Elec. Power*, 406 F. Supp. 2d at 274.

32. *Am. Elec. Power*, 582 F.3d at 392–93.

33. *See* Baker v. Carr, 369 U.S. 186, 220 (1962).

34. 5 U.S. (1 Cranch) 137, 165–66 (1803).

35. Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986).

36. United States *ex rel.* Joseph v. Cannon, 642 F.2d 1373, 1379 (1981), *quoted in Japan Whaling*, 478 U.S. at 230.

under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination."[37]

In theory, political questions contain two interconnected elements: a constitutional aspect, concerned with commitments of authority to Congress or the executive branch as opposed to the judiciary, and a prudential aspect, concerned with judicial competence, credibility, and institutional restraint.[38] The constitutional and prudential shades of the doctrine are not delineated by distinct formal tests but emphasize different sides of the basic principle of separation of powers. The prudential strand applies more strongly to *American Electric Power* because the arguments for nonjusticiability stem chiefly from considerations of institutional competence rather than from explicit constitutional allocations of authority.

The Supreme Court has been reluctant to refuse cases on political question grounds, and when it has, the Court has relied more on constitutional, rather than prudential, considerations.[39] However, the prudential aspect is neither theoretically misguided nor precedentially obsolete.[40] The seminal modern political question case, *Baker v. Carr*, implicitly preserved the legitimacy of the prudential aspect by recognizing that "even in private litigation which directly implicates no feature of separation of powers, lack of judicially discoverable standards and the drive for even-handed application" may demand judicial abstention.[41] The Court re-emphasized the prudential aspect in *Vieth v. Jubelirer*,[42] its most recent consideration of the political question doctrine.[43] Writing for the *Vieth* plurality[44] on a

37. Coleman v. Miller, 307 U.S. 433, 454–55 (1939), *quoted in Baker*, 369 U.S. at 210.

38. *See* Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 240 (2002) (calling the electorally insulated judiciary a "poor factfinder and policymaker as compared to Congress and the Executive"); *id.* at 253 ("Unlike the classical [or 'constitutional'] strand . . . the prudential [strand] is not anchored in an interpretation of the Constitution itself, but is instead a judge-made overlay that courts have used at their discretion to protect their legitimacy and to avoid conflict with the political branches.").

39. *See id.* at 267–68.

40. *But see id.* (noting the demise of the prudential prong in Supreme Court jurisprudence); *id.* at 332–34 (deeming the prudential prong an unprincipled, unmanageable, and "unjustified dereliction of the Court's duty"); Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1203–05 (2002) (identifying a migration of concern regarding judicial prudence away from invocation of the political question doctrine, towards stauncher application of standing requirements). Significantly, these commentaries were published before the Supreme Court decided *Vieth v. Jubelirer*, 541 U.S. 267 (2004). *See infra* notes 42–50 and accompanying text.

41. 369 U.S. 186, 213–14, 237 (1962) (finding justiciable a case involving voting district reapportionment, and making the quoted pronouncement in the context of judicial deference to political proclamations in determining when war had commenced).

42. 541 U.S. 267 (2004) (dismissing a gerrymandering claim as a nonjusticiable political question).

43. In *League of United Latin American Citizens v. Perry*, a subsequent gerrymandering case that implicated the doctrine, the Court declined to "revisit [*Vieth*'s] justiciability holding." 548 U.S. 399, 414 (2006).

44. It is imperative, when considering the precedential value of *Vieth*, to recognize that although Justice Scalia's opinion commanded only a four-justice plurality, Justice Kennedy,

gerrymandering claim, Justice Scalia observed, "One of the most obvious limitations imposed by [the Constitution] is that judicial action must be governed by *standard*, by *rule*. Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based on reasoned distinctions."[45]

Justice Scalia dedicated much of his analysis to demonstrating that courts could not, in any principled manner, discern whether gerrymandering had occurred in the first place.[46] However, he repeatedly distinguished the judiciary's ability to cognize a violation—a constitutional consideration—from its ability to manage a remedy—a prudential consideration.[47] In other words, even if some test could identify unlawful gerrymandering, no sufficiently principled standard would exist to guide the judiciary in competently managing its resolution.[48] Answering the many intricate questions about how a gerrymandering claim might be resolved—including "*How much* remedying of packing . . . ? *How many legislators* must have had the intent . . . and *how efficacious* must that intent have been . . . ?"—would require "a quantifying judgment that is unguided and ill suited to the development of judicial standards."[49] Justice Kennedy's concurrence similarly stressed an "absence of rules to limit and confine judicial intervention" and a "lack of comprehensive and neutral principles" for identifying as well as remedying gerrymandering.[50] Thus, the prudential component of the political question doctrine, though rarely relied upon, has not vanished from the Court's jurisprudence. Lower courts have also acknowledged the importance of

---

concurring in the judgment, expressly agreed with the plurality's evaluation of unmanageability under the circumstances. 541 U.S. at 306–11. Justice Kennedy chose not to join the plurality opinion because he believed that a manageable adjudicatory standard was conceivable and worried about foreclosing future claims. *Id.* at 306. *Vieth*'s finding of unmanageability thus bears the authoritative effect of a majority opinion. *See id.* at 308. In other words, it would be wrong to construe Justice Kennedy's concurrence as frustrating the application of political question doctrine where manageability is lacking. *But see* Barasich v. Columbia Gulf Transmission Co., 467 F. Supp. 2d 676, 683–84 (E.D. La. 2006) (adopting a more liberal interpretation of justiciability in light of *Vieth* and declining to invoke the political question doctrine in a claim alleging destructive inducement of coastal erosion).

45. 541 U.S. at 278.

46. *Id.* at 281–301.

47. *Id.* at 287–88 ("Before considering whether this particular standard is judicially manageable we question whether it is judicially discernible in the sense of being relevant to some constitutional violation."); *id.* at 290 ("[W]e find appellants' proposed standards neither discernible nor manageable."); *id.* at 295 ("Even if [a standard] could be manageably applied . . . there is no reason to think [it] would detect the constitutional crime . . . .").

48. *Id.* at 288, 290.

49. *Id.* at 296. One might contend that the reasoning in *Vieth* should not apply to *American Electric Power* because of the cases' distinguishable procedural dispositions. Justice Scalia noted that since *Vieth* had been ruled justiciable by the lower court (though the gerrymandering claims were found unsupported by the facts), the Supreme Court then had to "either enunciate the standard that causes us to agree or disagree with that merits judgment, or else affirm that the claim is beyond our competence to adjudicate." *Id.* at 303–04. However, that argument dodges on a procedural technicality the relevant underlying questions about principled justiciability.

50. *Id.* at 306–07 (Kennedy, J., concurring).

prudential considerations, holding that "[p]rudence, as well as separation-of-powers concerns, counsels courts to decline to hear 'political questions.' "[51]

In determining political question justiciability, contemporary courts look to the six factors set forth in *Baker* that contemplate constitutional and prudential elements and are "probably listed in descending order of both importance and certainty"[52]:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[53]

Political questions are more than just political cases; the doctrine will not bar suit when a case is merely politically charged.[54] Rather, dismissal is appropriate when one of *Baker*'s six formulations is "inextricable" from the controversy.[55] Making *Baker* determinations demands a "discriminating inquiry into the precise facts and posture of the particular case, [rejecting] resolution by any semantic cataloguing."[56] The second and third *Baker* factors are partly prudential in nature: the former because cases lacking neutral principles to justify and limit judicial management implicate judicial credibility and restraint; the latter because judicially inappropriate initial policy determinations pertain to institutional competence.[57]

---

51. Schroder v. Bush, 263 F.3d 1169, 1173 (10th Cir. 2001); *see also In re* African-American Slave Descendants Litig., 375 F. Supp. 2d 721, 765 (N.D. Ill. 2005) ("Prudential limits on the exercise of [judicial] power" including interests in "efficiency and legitimacy . . . play an important role in the political question doctrine").

52. *Vieth*, 541 U.S. at 278. *Baker* has provided the basis for political question analysis since its promulgation. *E.g.*, *id.* at 267 (with the plurality, concurring, and dissenting opinions invoking the *Baker* test). Every climate change nuisance decision has followed the *Baker* framework.

53. Baker v. Carr, 369 U.S. 186, 217 (1962).

54. *Id.* In *Klinghoffer v. S.N.C. Achille Lauro Ed Altrigestione Mononave Achille Lauro In Amministrazione Staordinaria*, for instance, a lawsuit against Palestinian airline hijackers survived political question scrutiny, notwithstanding the political sensitivities involved. 937 F.2d 44, 49 (2d Cir. 1991).

55. *Baker*, 369 U.S. at 217.

56. *Id.*

57. *See infra* note 100 and accompanying text.

B. *The Second Circuit's Political Question Analysis in* American Electric Power

To better contextualize the political question considerations necessary in injunctive climate nuisance claims, it is worth examining, as a preliminary matter, the Second Circuit's reversal of the district court's finding of nonjusticiability in *American Electric Power*. The court dedicated a significant portion of its opinion to refuting the lower court's political question determination, addressing each *Baker* factor and deciding that none barred suit.[58] This Note argues that the second and third *Baker* factors provide the best grounds for dismissal.[59]

The Second Circuit devoted more analysis to the second *Baker* factor, regarding judicially manageable standards for resolving a controversy, than to any other.[60] The court concluded that because federal courts could assess complex scientific evidence and rule according to "recognized judicial standards under the federal common law of nuisance," the factor of unmanageability did not apply.[61] The defendants had contended that the complexities presented by *American Electric Power* far exceeded those of prior pollution control cases; thus the "vague and indeterminate nuisance concepts and maxims of equity" gleaned from public nuisance precedent and the *Restatement (Second) of Torts* provided insufficient guidance.[62] The Second Circuit, however, cited to older decisions purporting to show that "federal courts have successfully adjudicated complex common law public nuisance cases for over a century."[63] Encapsulating its position on this point, the court observed that, in general, complexity alone "is not a reason for federal courts to shy away from adjudication."[64]

The court then dealt with the third *Baker* factor, regarding initial policy determinations of a kind for nonjudicial discretion, identifying this factor as the basis of the district court's dismissal.[65] The *American Electric Power*

---

58. Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 321–32 (2d Cir. 2009).

59. The first *Baker* factor is not implicated; only one of the four political question dismissals of climate nuisance suits found a textual commitment to another branch. California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 WL 2726871, at *13–14 (N.D. Cal. Sept. 17, 2007). Stronger arguments exist for the fourth, fifth, and sixth factors. For instance, the fourth factor could be relevant as Congress debates climate bills and as the EPA moves forward with GHG regulation. *See supra* notes 16, 19–21 and accompanying text. Judicial injunctions against GHG emissions might thereby express a "lack of the respect due coordinate branches of government." *Baker*, 369 U.S. at 217. However, these factors have been of little or no importance to political question determinations. *E.g.*, *In re* African-American Slave Descendants Litig., 375 F. Supp. 2d 721, 764–65 (N.D. Ill. 2005) (holding that the factors were sufficiently addressed by evaluating the first three).

60. *Am. Elec. Power*, 582 F.3d at 326–30.

61. *Id.* at 329.

62. *Id.* at 326 (quoting City of Milwaukee v. Illinois, 451 U.S. 304, 317 (1981)) (internal quotation marks omitted).

63. *Id.* at 326–27. It also referenced precedent supporting the invocation of the *Restatement (Second) of Torts* in a variety of federal tort actions. *Id.* at 327–28.

64. *Id.* at 329 (citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821)).

65. *Id.* at 330.

defendants contended on appeal that a trial court's decision would require making initial policy decisions about "whether to impose mandatory greenhouse gas emissions limits and, if so, on whom, in what manner and at what cost"—determinations more appropriate for a "comprehensive response" from the political branches.[66] The Second Circuit rejected this conclusion and emphasized that the common law may properly fill gaps in statutory regulation.[67] Deeming the case "an ordinary tort suit" requiring no initial policy determinations, the court held *Baker*'s third prong inapplicable.[68]

C. *At Least Two* Baker *Factors Should Apply to Cases Like* American Electric Power

The second and third *Baker* factors favor dismissal of cases like *American Electric Power* as a nonjusticiable political question. Subsection 1 of this Section argues that the political question doctrine plausibly extends to climate nuisance claims, and that refusal to extend it to such claims has rested upon circular, oversimplified framings of the litigation. Subsections 2 and 3 address the second and third *Baker* factors respectively, concluding that the judiciary lacks the institutional competence and constitutional mandate to prudentially decide this controversy.

1. *Extending the Political Question Doctrine to Climate Nuisance Suits*

The political question doctrine has never barred adjudication of non-climate-related public nuisance claims, but it should not automatically follow that those pertaining to climate change are justiciable. The Second Circuit decided that the doctrine did not apply because it framed *American Electric Power* as an ordinary tort suit. However, that court's conclusory oversimplification of climate nuisance claims downplays their scope, fails to appreciate their underlying dynamics, and oversimplifies the determinations required by their adjudication. Perfunctory labeling thereby lays a faulty foundation for analysis of the *Baker* factors.

The chief argument against applying the political question doctrine to climate nuisance cases, as one commentator put it succinctly, is as follows:

> The complexity of [climate change nuisance] cases, or speculation about issues that may arise downstream in the litigation, should not color the assessment of their manageability.... [C]ourts need not await a policy

66. *Id.*

67. *Id.* ("Congress's mere refusal to legislate . . . falls far short of an expression of legislative intent to supplant the existing common law in that area." (quoting United States v. Texas, 507 U.S. 529, 535 (1993)). Further, the Second Circuit noted neither Congress nor the executive branch favored increasing GHGs, but rather were concerned about global warming. *Id.* at 331. The court noted that plaintiffs can bring federal common law public nuisance claims when existing statutes fail to provide a remedy through comprehensive pollution control in that area. *Id.* at 330–31 (citing *Milwaukee*, 406 U.S. at 101–02).

68. *Id.* at 331.

> decision from the political bra[n]ches in order to adjudicate these matters because the tort law on which these public nuisance claims are based constitutes an established policy from which the courts must draw their standards.[69]

In other words, the contention is that climate nuisance claims fall under tort law's general theoretical umbrella, so a tort framework provides sufficient guidance for judicial resolution of the claims, thus avoiding the second *Baker* factor. Moreover, since the court's decisions will follow from established tort principles, adjudication will not require new, inappropriate policy determinations, making the third *Baker* factor inapplicable.

However, to say that cases like *American Electric Power* are justiciable just because plaintiffs allege a public nuisance begs the question: Why should such claims automatically be justiciable? It contravenes the purpose and articulation of the political question doctrine to suggest that nuisances are categorically justiciable because political questions have historically excluded torts between private parties and have focused instead on governmental issues like gerrymandering, foreign policy, and federal employment.[70] Again, *Baker* demanded "discriminating" case-by-case inquiries, rejecting "resolution by any semantic cataloguing."[71] Similarly, the fact that other public nuisance claims have not presented political questions in the past should not preclude such a finding in the climate context.[72] Indeed, the argument for nonjusticiability rests on the notion that climate suits are unique and therefore defy classification among tort precedent.[73]

---

69. LaTourette, *supra* note 7, at 283–84.

70. *See generally* Barkow, *supra* note 38.

71. Baker v. Carr, 369 U.S. 189, 217 (1962); *see also* McKay v. United States, 703 F.2d 464, 470 (10th Cir. 1983) ("[T]he political question theory . . . do[es] not *ordinarily* prevent individual tort recoveries.") (emphasis added). *But see* Klinghoffer v. S.N.C. Achille Lauro Ed Altrigestione Mononave Achille Lauro In Amministrazione Staordinaria, 937 F.2d 44, 49 (2d Cir. 1991) (finding a lawsuit against airline hijackers judicially manageable because "the common law of tort provides clear and well-settled rules"); Borissov, *supra* note 7, at 438–39 (noting that political questions involve controversies more "constitutional" than public nuisance claims); LaTourette, *supra* note 7, at 239 ("[T]ort law supplies courts [in environmental cases] with judicially manageable standards, the presence of which obviate the need for any initial policy decision from the political branches.").

72. *But see* Borissov, *supra* note 7, at 443–44 (calling *American Electric Power* a "regular public nuisance case" despite the novelty of climate issues); LaTourette, *supra* note 7, at 258–59 (reasoning that climate litigation categorically is manageable under *Baker* since "the courts have a long-established tradition of adjudicating public nuisance claims, and possess the legal tools to fix remedies in such actions").

73. Borissov discusses only one other nuisance case at any substantial length, *Georgia v. Tennessee Copper Co.*, 237 U.S. 474 (1915), for the proposition that *American Electric Power* is a "regular" case. Borissov, *supra* note 7, at 447. However, a comparison to *Tennessee Copper* is ultimately unsatisfying. *See infra* note 87 and accompanying text. LaTourette discusses other environmental cases, including *Gordon v. Texas*, 153 F.3d 190 (5th Cir. 1998) and *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676 (E.D. La. 2006), in which erosion-related claims survived political question challenges. LaTourette, *supra* note 7, at 252–53, 257–58. Those decisions are distinguishable because, besides not being nuisance suits, they each contemplated damages, not injunctive relief. The *Gordon* court emphasized the inherently greater manageability of suits for damages, 153 F.3d at 195, while the *Barasich* court, invoking *Gordon*, distinguished *American Electric Power* on the grounds that it sought an injunction, 467 F. Supp. 2d at 685–86. *See also infra* note 88.

Extending the political question doctrine to a public nuisance allegation would surpass precedent in terms of claim-category application. Yet with respect to the theory behind the doctrine, such an extension is proper because cases like *American Electric Power* would push existing nuisance law to embrace a complex, qualitatively unique phenomenon that cannot be prudentially adjudicated.[74] The Supreme Court has never held that torts cannot present political questions, so prudential constitutional principles should similarly apply to them. This Note simply argues that the facts, claims, parties, and relief demanded in this particular mode of litigation should fall under the nonjusticiability umbrella, wherever its limits may lie.[75] The following analysis of *Baker* invokes the *American Electric Power* situation specifically for the sake of convenience, but the arguments therein should be read to apply to injunctive climate nuisance claims generally.

2. *The Second* Baker *Factor: Judicially Manageable Standards*

Judicially manageable standards do not exist for deciding reasonableness and fashioning an emissions cap in *American Electric Power*, since existing authority does not provide principled guidance for adjudicating the novel dynamics of climate change.[76] Analogous to the problematic gerrymandering questions in *Vieth*,[77] critical questions regarding reasonableness undermine judicial manageability in *American Electric Power*. In order to prudentially resolve the merits of the claims, legal authorities must provide a framework for deciding reasonableness in the alleged unreasonable interference with a common right of the general public.[78] Of course, a judge *could* "resolve" the case by enjoining the defendants pursuant to some new standard for emissions reasonableness, just as a judge could have promulgated and applied a gerrymandering test in *Vieth*. The relevant inquiry, however, is whether there exists sufficient legal guidance for a judge to discover and implement a standard in a principled, consistent manner.[79] Public nuisance

74. *See infra* note 84 and accompanying text.

75. This Note does not purport to suggest exactly where the line ought to be drawn in applying the political question doctrine to tort claims. A consideration of the potential doctrinal "slippery slope"—where courts might improperly refuse to adjudicate claims solely on the basis of complexity—is beyond the scope of the present discussion.

76. This Note considers the second factor first because the *Baker* criteria "are probably listed in descending order of both importance and certainty." Vieth v. Jubelirer, 541 U.S. 267, 278 (2004). Also, one district court has held that "an initial policy determination [the third factor] is unnecessary when there are judicially manageable standards [the second factor]." *Barasich*, 467 F. Supp. 2d at 686–87.

77. *See supra* note 49 and accompanying text. Questions regarding manageability under the second *Baker* factor may overlap with questions regarding initial policy determinations under the third *Baker* factor. *See infra* Section II.C.3.

78. Reasonableness factors include the significance of the conduct's interference with public health, safety, peace, comfort, or convenience; the legality of the activity; whether the conduct is continual or lasting; and whether the defendant had reason to know the effect was significant. RESTATEMENT (SECOND) OF TORTS § 821B.

79. *Vieth*, 541 U.S. at 278 ("[L]aw pronounced by the courts must be principled, rational, and based upon reasoned distinctions.").

law simply does not meaningfully guide the adjudication of *American Electric Power* the way it does traditional claims involving discrete river pollution or noxious fume emissions.[80]

First, even the most comparable cases that the Second Circuit could identify as examples of principled judicial management of nuisance claims are still fundamentally off-point. Those decisions range from 1851 to 1972, with only one after 1931 and the most relied upon decisions—*Missouri v. Illinois*[81] and *Georgia v. Tennessee Copper Co.*[82]—dating to the early twentieth century.[83] Age does not invalidate precedent, of course. Here, though, the precedent's age inversely correlates with its analogousness to the current claim. Unlike in the cited cases, consideration of injury, causation, and reasonableness in *American Electric Power* would entail confronting a diffuse causal process with billions of culprits and novel lag-effect dynamics, internal feedback loops, and statistically manifesting harms.[84] Climate change has a lag effect because there is an unpredictable, sometimes centuries-long delay between the GHG emissions and the manifestation of the environmental or societal harm, due to the causal domino effect contained between the initial cause and the final effect. Internal feedback loops of cyclical greenhouse-effect self-exacerbation add to the complexity and uncertainty of global warming's cause–effect dynamic. Further complicating matters, climate harms, like extreme weather events or changes in precipitation, manifest themselves statistically, such that there is no point at which one can say, "This, now, is the result of climate change." Rather, events just become more likely and more severe. This categorically distinct phenomenon cannot be cognized under the same framework used to evaluate, for example, a bridge's interference with navigation.[85]

---

80. *Accord* Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 875 (N.D. Cal. 2009) (finding that the "long, prior history of air and water pollution cases" did not provide sufficient guidance for fashioning principled relief).

81. 200 U.S. 496 (1906) (holding that Missouri had not established injury and causation in a nuisance suit in equity against Illinois for Chicago's discharge of sewage into the Mississippi River's tributary system).

82. 206 U.S. 230 (1907) (granting injunctive relief to Georgia when noxious emissions from cross-border copper foundries were harming Georgia lands).

83. Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 326–27 (2d Cir. 2009).

84. *See generally* IPCC, *Physical Science Basis*, *supra* note 2, ch. 8. To illustrate the lag effect between a utility's emissions (the original cause) and a rise in sea levels (the ultimate harm): the GHG molecules must disperse in the atmosphere, add to the trapping of solar and thermal radiation, thereby increasing temperatures, which melts icecaps, and leads to thermal expansion of the oceans, thus elevating sea levels—a process that takes literally centuries to unfold. To illustrate internal feedback loops: at some imprecise point, rising temperatures in the Amazon could cross a threshold where the rainforest stops generating its own precipitation, transforming jungle into savannah and releasing gigatons of GHGs. In other words, when a system is pushed past the brink of internal stability, transformative processes within that closed system initiate a cycle of self-exacerbation, without additional pressures from outside systems. Finally, to illustrate statistical manifestation: while hurricanes have always occurred, global warming will make them stronger and more probable.

85. *But see Am. Elec. Power*, 582 F.3d at 327 (citing, among other cases, a Supreme Court decision from 1851 regarding bridge interference as evidence of competent judicial management of nuisance claims).

The cited precedents, with their relatively simple, confined, discrete nuisance elements, do not offer meaningful standards for assessing reasonableness in the GHG emissions context and are thus distinguishable from the claims in *American Electric Power*. *Kivalina*—a post-*American Electric Power* climate nuisance decision—rightly distinguished the cited nuisance precedents because they involved "a discrete number of 'polluters' that were identified as causing a specific injury to a specific area," and because their discharges were harmful per se—in contrast to the sequential chain of consequences separating GHG emissions from the eventual manifestation of climate injuries.[86]

Taking *Kivalina*'s observations a step farther, an array of fundamental factual changes would be necessary to make the cases relied upon by the Second Circuit sufficiently comparable to *American Electric Power* as to provide an analogous standard for fashioning a "reasonable" emissions cap in the alleged climate-based public nuisance. For instance, examining *Tennessee Copper*[87]—in which a smeltery's noxious fumes had damaged adjacent lands—as an emblematic attempt at analogy, the following factual adjustments would be required for it to meaningfully guide adjudication of *American Electric Power*: (a) the smeltery's emissions had never before been considered harmful or nuisance-presenting; (b) those emissions contributed to a complex global dynamic that hurt the plaintiff, not through its direct effects, but by exacerbating a natural phenomenon, giving rise to other conditions that, in turn, made injuries unpredictably more frequent and severe; (c) the emissions had the potential to spawn processes that, once some internal threshold of emissions concentration were crossed in the plaintiff's territory, would initiate a distinct process of closed-system generation of the same emissions by the plaintiff's land itself; and (d) billions of diverse other emitters (i.e., not just smelteries) around the world, in addition to natural processes, contributed to that same harm through several kinds of fumes bearing an identical effect.

American Electric Power thus defies precedent in sheer quantitative complexity while also posing crucial qualitative differences. GHG emissions are not inherently noxious; climate injury causation is not direct, immediate, or obvious; and the diffuse, global nature of climate harms makes them untraceable to particular sources, natural or anthropogenic. Rather, the centuries-lagging, feedback-fueled, statistical harms present a case that is

---

86. The *Kivalina* court said:

> While a water pollution claim typically involves a discrete, geographically definable waterway, Plaintiffs' global warming claim is based on the emission of greenhouse gases from innumerable sources located throughout the world and *affecting the entire planet* . . . . [Moreover,] the discharge in excess of the amount permitted is presumed harmful . . . [whereas] the harm from global warming involves a series of events disconnected from the discharge itself. In a global warming scenario, emitted greenhouse gases combine with other gases in the atmosphere which *in turn* results in the planet retaining heat, which *in turn* causes the ice caps to melt and the oceans to rise, which *in turn* [causes harmful effects].

Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 875–76 (2009).

87. 206 U.S. 230 (1907).

alien in kind, not just more complicated in number. Tort case law simply does not provide a suitable framework for climate nuisance adjudication.[88] Rather, asking a court to navigate the novel dynamics of *American Electric Power* "casts [the judge] forth upon a sea of imponderables, and asks [him or her] to make determinations that not even . . . experts can agree upon."[89]

General statements of tort principles fail to shore up the inadequacies of the cited case law. Note that "the evaluation of a nuisance claim is not focused entirely on the unreasonableness of the harm," but rather involves balancing "the utility and benefit of the alleged nuisance against the harm caused."[90] Accordingly, a court would be forced to adjudge the viability of low-emissions energy production (required for the defendants to comport with an emissions cap while still meeting consumer demands) by trying to weigh the costs and uncertainties of alternative energies against the benefits of lessening the statistical risk of injuries stemming from an enhanced greenhouse effect.[91] As the *Kivalina* court recognized, there exist no "particular judicially discoverable and manageable standards [for] rendering a decision that is principled, rational, and based upon reasoned distinctions" for this kind of policy balancing,[92] which defies nuisance law and should be relegated to the political branches.[93] In *American Electric Power*, *Baker* unmanageability arises from the notion that "[n]o test . . . can possibly be successful unless one knows what he is testing *for*"[94]—here, what "reasonableness" means.[95]

---

88. Non-nuisance environmental cases are also distinguishable. For instance, in *Barasich*—where private plaintiffs sought damages from energy companies whose pipeline-building and exploration activities allegedly exacerbated Hurricane Katrina's damage to coastal lands—the court expressly distinguished *American Electric Power* in the political question context, both because the request for injunctive relief in *American Electric Power* made the case more legislative in nature and because the *Barasich* claims were based on negligence rather than nuisance. Barasich v. Columbia Gulf Transmission Co., 467 F. Supp. 2d 676, 685–86 (E.D. La. 2006).

89. Vieth v. Jubelirer, 541 U.S. 267, 290 (2004).

90. *Kivalina*, 663 F. Supp. 2d at 874 (citing RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979)). The reasonableness reasoning of *Kivalina*, which contemplated damages for relief, similarly applies to the question in *American Electric Power*, notwithstanding the fact that the latter case is distinguishable in contemplating injunctive relief. Indeed, courts have found prayers for injunctions to be less manageable than actions for damages. *E.g.*, Gordon v. Texas, 153 F.3d 190, 195 (5th Cir. 1998). So if anything, the present point is strengthened by the decision.

91. *See Kivalina*, 663 F. Supp. 2d at 874.

92. *Id.* at 875.

93. Indeed, scholars agree that "the political branches should solve the climate change problem," and that " 'nuisance litigation is ill-suited to other than small-scale, incidental, localized, scientifically uncomplicated pollution problems.' " Zasloff, *supra* note 7, at 1829 (quoting JESSE DUKEMINIER ET AL., PROPERTY 665 (6th ed. 2006)); *see also* Eric Biber, *Climate Change and Backlash*, 17 N.Y.U. ENVTL. L.J. 1295, 1310–11 ("The very fact that environmentalists, major policymakers, Congress, and other actors are placing enormous political capital and energy into developing a regulatory system indicates a strong lack of faith that liability solutions will be the primary solution to the climate change policy.").

94. *Vieth*, 541 U.S. at 297.

95. *See infra* notes 101–113 for further discussion of the problems with finding a reasonableness standard in *American Electric Power*.

The argument for second-factor nonjusticiability is not just that injunctive climate nuisance claims are complicated—courts make difficult decisions all the time.[96] Rather, it is that no standard exists on which to base a decision. Public nuisance common law does not answer climate questions the way it answers questions about traditional pollution. Like the situation in *Vieth*, a court, lacking the institutional capacity to prudentially fashion relief standards sua sponte,[97] cannot point to legal authorities that guide the policy balancing necessary to fashion relief in this controversy. Neither judicial precedents nor tort principles provide courts with climate change resolution standards that are sufficiently "principled, rational, and based on reasoned distinctions."[98] Absent "comprehensive and neutral principles" for emissions reasonableness, the prudential concerns of the second *Baker* factor favor dismissal.[99]

3. *The Third* Baker *Factor: Initial Policy Determinations*

The third *Baker* factor, regarding the impossibility of making initial policy determinations not for judicial discretion, should also render injunctive climate nuisance claims nonjusticiable. This factor acknowledges the impropriety of courts promulgating decisions they are ill-equipped to make, and for which they have no political mandate. Third-factor inquiry may hinge on some of the same questions as the second, regarding manageability.[100] Under the third factor, though, courts must ask whether they can adjudicate without effectively charting a new course of action that should be navigated by Congress or the executive (as opposed to whether existing legal authority guides adjudication in a sufficiently principled manner). Analytically, a judge must decide both whether a policy determination is initial and whether it is within the judiciary's decisional purview. Adjudicating claims like *American Electric Power* implicates several initial policy determinations, including, at least: What should the aggregate cap for GHG

---

96. I acknowledge LaTourette's contention that "courts have created new standards for providing remedies throughout our jurisprudential history." LaTourette, *supra* note 7, at 265. This Part argues, though, that *American Electric Power*'s claims push beyond the prudential boundary of judicial innovation in remedy fashioning.

97. *See* Barkow, *supra* note 38, at 329 ("There are also some questions that may be better suited to the political branches because of institutional competence to gather and interpret the facts that are central to those questions.").

98. *Cf. Vieth*, 541 U.S. at 278. LaTourette contends that "courts are uniquely situated" to pronounce unreasonable interference in climate-related public nuisance claims and must be allowed to proceed past the pleadings and into discovery. LaTourette, *supra* note 7, at 261–62 (downplaying "the breadth of these cases or the logistical difficulties they present" because "[t]he tort of public nuisance provides the courts the legal tools necessary to make a reasoned decision"). This Part argues, however, that conceptualizing *American Electric Power* as just another tort is conclusory and would spur unprecedented, institutionally inappropriate judicial management.

99. *Vieth*, 541 U.S. at 306–07 (Kennedy, J., concurring).

100. For instance, in *American Electric Power*, second-factor problems with fashioning a reasonableness standard, *see supra* Section II.C.2, also arise under the third *Baker* factor vis-à-vis determining an aggregate emissions cap, *see infra* notes 102–110 and accompanying text.

emissions be? What entities should be targeted in the emissions "stream"? And, what remedy is appropriate for achieving emissions reductions?

Perhaps the most significant initial policy determination the court would be required to make is the determination of a reasonable aggregate emissions cap—a necessary consideration in deciding reasonableness in nuisance adjudication. True, the court could refrain from expressly naming any national or global emissions limit while setting a "reasonable" cap on defendants' emissions. But it would be impossible for judges to evaluate the reasonableness of individual emissions without promulgating an aggregate limit behind the published opinion. It would be meaningless to label an individual contribution as "too much" without determining maximum acceptable aggregate emissions.[101]

That a court would need to conjure a figure for maximum aggregate emissions follows from two principles. First, some reasonable output level must exist, since some emission of GHGs is necessary for a functioning society. Second, only worldwide aggregate emissions matter in calculating the gravity of harms caused by global warming. That is, emissions' origin is irrelevant to the manifestation of climate change, which results from the dispersal and accumulation of GHGs throughout the atmosphere.[102] To illustrate, global warming would manifest no more severely in Connecticut if a ton of CO_2 came from Hartford than if it came from Beijing. Therefore, the climate harm caused by an emitter—and hence that emitter's reasonableness—derives from the fraction of *global* aggregate emissions that it contributes. Stating in a vacuum that some defendants' emissions are unreasonable is analogous to saying that a radio is too loud without reference to where it is being played, who is listening, the reason it is being played, and so on.[103] A court would thus logically have to make, at least implicitly, an initial finding regarding aggregate emissions in order to set a reasonable, proportion-based injunctive cap.

That necessary determination of an aggregate cap would be both initial and inappropriate for the judiciary. With regards to initial-ness, although Congress and the executive branch have already made the general determi-

---

101. Opinions vary regarding acceptable levels, due not only to scientific uncertainty about what atmospheric concentration of GHGs is necessary to avoid catastrophic change and what annual emissions levels would stabilize at that concentration, but also due to questions of economic feasibility and balancing. *See* IPCC, *Synthesis Report*, *supra* note 1, at 44–70.

102. William D. Nordhaus, *To Tax or Not to Tax: Alternative Approaches to Slowing Global Warming*, 1 REV. ENVTL. ECON. & POL'Y 26, 30 (2007).

103. Distinguish climate nuisance claims from nuisance situations involving loud noises or noxious fumes, for example, where the degree of injury also depends on, among other things, the location of the alleged nuisance. In those cases, the proximity of the defendant's activity influences how much harm or interference the plaintiff experiences, so a court could justifiably say that a given amount of noise, fumes, etc., is reasonable somewhere but excessive elsewhere. *See, e.g.*, Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700 (Ariz. 1972) (enjoining the operation of a feedlot, but forcing the plaintiff to pay relocation costs, where encroachment by the plaintiff housing development into a previously rural area made the feedlot's activities no longer reasonable). In contrast, the only relationship between GHG emissions and climate change—and hence, the degree of the alleged nuisance's interference with a public right—is volume.

nation that climate change is detrimental,[104] neither has come close to identifying a figure for an aggregate emissions cap.[105] Even less clear is how such a cap should translate into "reasonable" emissions allowances among various constituencies. For instance, is it reasonable for states with greater dependence on dirty-burning coal to emit more than states that can more readily utilize cleaner natural gas or renewable energy sources like wind, solar, and water? Is it reasonable for older power plants to emit more than newer ones, in light of cleaner modern technologies for electricity production? Is it reasonable for a utility in a poor area to emit more than one in an affluent area in order to provide cheaper energy to its consumers, given the regressive nature of pricier clean energy?[106]

Having established that the implicit cap-setting policy determination would be initial, it is also one that is inappropriate for the courts to make. The judiciary lacks the institutional mandate to credibly weigh the science against the array of economic tradeoffs that different caps would imply, given that such tradeoffs would involve policy-based value judgments that should be reserved for the politically accountable branches.[107] Also, while this Note does not suggest that courts should not hear cases involving complex scientific issues, the tremendous scientific complexity of climate change certainly does not help the case for justiciability of climate-based claims. That is, as a supplement to the values-based separation-of-powers argument for judicial abstention,[108] the fact that litigating climate suits implies global scientific and economic factfinding so intricate that even UN panels (with far more resources and expertise than the courts) struggle to assess the data and weigh competing values further counsels for judicial abstention.[109]

---

104. *See supra* notes 15–16, 19–21 and accompanying text.

105. There isn't even consensus regarding what long-run atmospheric concentration of GHGs would avoid catastrophic global warming—a logical prerequisite for setting emissions caps meant to keep us below that level. *See* IPCC, *Synthesis Report*, *supra* note 1, at 44–54. *But see* Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 331 (2d Cir. 2009) (implying that the fact that Congress and the executive do not favor increasing GHG emissions negates initial-ness under the third *Baker* factor).

106. *See* Robert N. Stavins, *A Meaningful U.S. Cap-and-Trade System to Address Climate Change*, 32 HARV. ENVTL. L. REV. 293, 337–44 (2008) (considering the distributional concerns of allocating emissions allowances under cap-and-trade—concerns that would also apply if a court were to limit emissions rights with an injunction, given the analogous capping effect).

107. *See* Barkow, *supra* note 38, at 329–30 (acknowledging that the political question doctrine "reflects not only the structure and text of the Constitution, but a very pragmatic determination that some questions should be decided by the political branches because of their accountability and institutional competence").

108. In other words, that judicially unprecedented, values-based decisions—such as reasonableness in the context of GHG emissions—should be relegated to the political branches.

109. *Cf.* Vieth v. Jubelirer, 541 U.S. 267, 290 (2004) (finding nonjusticiability where adjudication would "[ask a judge] to make determinations that not even . . . experts can agree upon"). The *IPCC Synthesis Report* illustrates the complexities and tentativeness of climate change projections—notwithstanding years of research and input from thousands of researchers and policymakers. *See* IPCC, *Synthesis Report*, *supra* note 1, at 7 ("Because understanding of some important effects driving sea level rise is too limited, this report does not assess the likelihood, nor provide a best estimate or an upper bound for sea level rise.").

Similarly concerned about institutional competence, the Tenth Circuit found *Schroder v. Bush* to present a political question when independent farmers sought to force the executive branch to adopt policies more favorable to small-scale agriculture.[110] The court explained that it was employing the nonjusticiability doctrine as a tool for maintenance of governmental order.' "[111] The third *Baker* factor was implicated, among others, because the judiciary is "ill-equipped to make highly technical, complex, and on-going decisions regarding how to maintain market conditions, negotiate trade agreements, and control currency," whereas "[t]he political branches . . . retain just this sort of institutional competence."[112] Like the various policy questions posed by *Schroder*,[113] the effective regulation of the energy policies of the largest utilities companies in America demands initial determinations and policy balancing better left to Congress or the executive branch, given courts' lack of both accountability and expertise.[114]

Another initial policy determination implicated by climate change litigation involves which entities should be targeted for emissions regulation.[115] One ongoing debate concerns whether "upstream" emissions sources (e.g., coal producers) or "downstream" emitters (e.g., residences) would more efficiently bear liability.[116] Further, Congress is debating whether sensitive

---

110. 263 F.3d 1169 (10th Cir. 2001).

111. *Id.* at 1175 (quoting Baker v. Carr, 369 U.S. 186, 215 (1962)).

112. *Id.*

113. *Schroder* is distinguishable from *American Electric Power* in that *Schroder*'s contemplation of " 're-formulat[ing] national policies' by *requiring the federal government* to alter many federal programs" is beyond the scope of *American Electric Power*, in which a ruling for the plaintiffs would not require such explicit legislative or administrative policy changing. Borissov, *supra* note 7, at 445 (quoting *Schroder*, 263 F.3d at 1176) (footnote omitted). However, Borissov's excerpt refers to the *Schroder* plaintiffs' request for a national emergency declaration, which was denied on the basis of the second and sixth *Baker* factors. *Schroder*, 263 F.3d at 1176. *Schroder*'s third-factor discussion of institutional incompetence with respect to policy balancing remains relevant to *American Electric Power*: while not formulating a national scheme, the court would certainly be making initial determinations appropriate for the political branches.

114. *See* Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863, 875 (N.D. Cal. 2009) ("The resolution of Plaintiffs' nuisance claim requires balancing the social utility of Defendants' conduct with the harm it inflicts. That process, by definition, entails a determination of what would have been an acceptable limit on the level of greenhouse gases emitted by Defendants."); California v. Gen. Motors Corp., No. C06-05755 MJJ, 2007 WL 2726871, at *8 (N.D. Cal. Sept. 17, 2007) (concluding that the court would be required "to balance the competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development," which it found to be "the type of initial policy determination to be made by the political branches, and not [the judiciary]"); *see also* Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 268 (S.D.N.Y. 2005) (identifying the *American Electric Power* defendants as the top CO_2-emitting utilities in the United States).

115. Granted, in an immediate sense it is the plaintiffs, not the courts, who choose the defendants in a lawsuit. Nevertheless, a climate nuisance court implicitly authorizes such quasi-regulatory litigation by entertaining the plaintiffs' claims, thereby involving policy determinations.

116. *See, e.g.*, Reuven S. Avi-Yonah & David M. Uhlmann, *Combating Global Climate Change: Why a Carbon Tax Is a Better Response to Global Warming Than Cap and Trade*, 28 STAN. ENVTL. L.J. 3, 31–32 (2009) (discussing the merits of upstream versus downstream regulation under carbon tax and cap-and-trade systems); Stavins, *supra* note 106, at 309–13 (advocating upstream cap-and-trade regulation); Zasloff, *supra* note 7, at 1861 (arguing that the climate change nuisance suits have unwisely targeted "midstream" GHG gas emitters). The district court in *American Elec-*

industries and regions should receive special treatment due to fairness and economic reasons.[117] As summarized by the *Kivalina* court, "virtually everyone on Earth is responsible on some level for contributing to such emissions," and, as such, "the allocation of fault—and cost—of global warming is a matter appropriately left for determination by the executive or legislative branch in the first instance."[118] The political branches, not the courts, possess the mandate and the expertise to decide where to place emissions liability, which clearly bears upon the prudence of enjoining the *American Electric Power* utilities.

Yet another initial policy determination concerns how emissions abatement should be pursued, which is implicated in a court's choice between injunctive relief and damages in climate litigation.[119] Congress is contemplating various cap-and-trade schemes—theoretically more akin to injunctions, since an emitter's harm-causing activity has a definite ceiling—though there are competing proposals for tax mechanisms—more like damages, since an emitter can choose to emit without limit if it pays the consequences.[120] Further, the EPA is in the initial stages of regulating GHG emissions under the CAA, which would include both equitable elements—since rules and entitlement-like allowances would issue—and legal elements—since statutory violations could trigger fines.[121] Congress and the executive have not made an initial policy determination about relief form. Those politically accountable branches, with their superior capacities to consider complex incentive programs, should be the ones to make that decision.[122]

Initial policy determinations should not be conflated with issues of preemption and preclusion. Erroneously, under the auspices of evaluating the third *Baker* factor, the Second Circuit posed the question of whether legislative silence categorically bars federal common law nuisance suits.[123]

---

tric Power recognized similar questions. *E.g.*, 406 F. Supp. 2d at 273 ("[S]hould the societal costs of reducing such emissions be borne by just a segment of the electricity-generating industry and their industrial and other consumers? Should those costs be spread across the entire electricity-generating industry (including utilities in the plaintiff States)? Other industries?").

117. *See supra* notes 11, 106 and accompanying text.

118. 663 F. Supp. 2d at 877.

119. *See* Zasloff, *supra* note 7, at 1838–43 (discussing the important advantages, disadvantages, and policy implications of this choice).

120. *E.g.*, Avi-Yonah & Uhlmann, *supra* note 116 (arguing that a carbon tax would be preferable to cap-and-trade regulation).

121. *See supra* notes 19–21 and accompanying text.

122. This determination is probably the most marginal, for political question purposes, of those discussed. That is, it involves the least potential for policy-related ripple effects, and the judiciary possesses more relative competence in this matter. Also, the litigants, not the courts, frame the relief choice, though the courts are the ultimate enforcers of it. In any event, this determination is secondary to those identified previously, which should be sufficient in themselves for third-*Baker*-factor nonjusticiability. Even accepting judicial discretion to decide the form of relief, a court still could not avoid, for instance, making an initial policy determination about an aggregate emissions cap.

123. Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 330–31 (2d Cir. 2009). It is true that legislative silence does not necessarily preempt federal common law suits. City of Milwaukee v.

However, the third factor does not contemplate preemption and preclusion. Preemption in a political question sense is relegated to the first *Baker* factor, i.e., whether an issue is textually committed to another branch. Meanwhile, preclusion would occur if GHG emissions were regulated by statute and that statute dictated that compliance with it would preclude suit. The appropriate third-factor inquiry is not whether silence affirmatively supplants all claims. Rather, the question is whether the judiciary, faced with the other branches' silence, can prudently make an initial policy determination.[124] The Second Circuit did not address that consideration, holding simply that the plaintiffs' common law causes of action were not precluded. Had it engaged in appropriate self-evaluation, the court should have concluded that the aforementioned requisite initial determinations are outside its institutional purview.

The Second Circuit oversimplified our most pressing global environmental challenge when it summarily stated that *American Electric Power* was an "ordinary tort suit" for which no initial policy determinations are required because "[similar] claims have been adjudicated in federal courts for over a century."[125] The court used "claims" to refer sweepingly to public nuisance suits generally, not to climate change nuisance in particular. Yet as the foregoing analysis has shown, the relevant inquiry must hone in on the climate context. The precedent relied upon by the Second Circuit does not change the fact that the adjudication of cases like *American Electric Power* will require policy determinations that are both initial and inappropriate for judicial pronouncement.

III. CASES LIKE *AMERICAN ELECTRIC POWER* SHOULD BE DISMISSED FOR LACK OF REDRESSABILITY

Political question scrutiny aside, public nuisance suits seeking emissions caps should be dismissed for lack of redressability—a required element of constitutional standing. Granting an injunction on emissions would provide hollow, practically meaningless relief, and relief would be conjectural anyway. Section A of this Part outlines the analytical framework for redressability in climate nuisance cases. Section B continues with *American Electric Power* as an example to ground redressability analysis. It addresses line-drawing difficulties posed by the case, arguing that finding redressability in *American Electric Power* would render the requirement merely semantic. This is true given the at-best nominal relief the plaintiffs could gain through an injunction—a problem accentuated by the unprincipled joining of defendants in the case. Finally, Section C argues that, even putting aside all line-drawing problems, enjoining the defendants would

Illinois, 406 U.S. 91, 103–07 (1972). The Second Circuit was reacting, with this line of reasoning, to the district court's framing of the issue. *Am. Elec. Power Co.*, 582 F.3d at 330. Still, if the lower court reached its third-factor *Baker* conclusion based on skewed preemption logic, the Second Circuit should have corrected it without embarking on an off-point *Baker* analysis.

124. Baker v. Carr, 369 U.S. 186, 217 (1962).

125. 582 F.3d at 331.

provide only speculative relief for the plaintiffs, so redressability is not satisfied.

A. *The Proper Redressability Standard for Climate Nuisance Claims*

Redressability is one of the judge-made standing requirements derived from Article III of the Constitution.[126] The Supreme Court interpreted Article III in *Lujan v. Defenders of Wildlife* to generally require that "it must be 'likely,' as opposed to merely 'speculative,' that the [alleged] injury will be 'redressed by a favorable decision.'"[127] *Lujan* provides the standing framework for climate nuisance cases. *Massachusetts v. EPA*, however, causes some confusion for applying *Lujan*'s "likely, as opposed to merely speculative" standard in climate change nuisance cases.

Massachusetts contained two redressability-related standards, one inapposite and one arguably relevant to climate nuisance claims. The first was its broader finding that the state plaintiffs should receive "special solicitude" for each standing prong; this does not apply to climate nuisance cases.[128] More ambiguous in its applicability to climate nuisance cases, though, is *Massachusetts*'s statement that, for redressability in particular, it sufficed that "[a] reduction in domestic emissions would slow the pace of global emissions increases" and "[the risk of global warming] would be reduced to some extent . . . ."[129] The ambiguity stems from the fact that the majority in *Massachusetts* invested much in discussing the physical harms of climate change, though the resolution of the controversy hinged on procedural rights

---

126. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 63 (3d ed. 2006). Other standing prongs include the injury requirement, the causation requirement, and the zone-of-interests test. *Id.* The Supreme Court once treated causation and redressability as a single test. *See* Warth v. Seldin, 422 U.S. 490, 505 (1975). It seems logical that an injury caused by a defendant would be redressed by granting relief from the defendant's injurious behavior, and commentators have argued that separating the two prongs is nonsensical. CHEMERINSKY, *supra*, at 82. Nevertheless, the Supreme Court has counted causation and redressability as distinct prerequisites. *E.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). This Note addresses the redressability prong partly because opinions and commentary have focused less on it than on causation. More importantly, this Note's argument regarding the speculative nature of relief that an injunction could offer falls under a redressability framework. *See infra* Section III.C.

127. 504 U.S. at 560–61 (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38, 43 (1976)).

128. *Massachusetts v. EPA*, a landmark Supreme Court decision, might intuitively seem to provide the analytical framework for standing in a case like *American Electric Power* because it likewise involved state plaintiffs and was related to climate change. 549 U.S. 497 (2007); *see also supra* text accompanying notes 17–19. Such an intuition would be wrong, however. The 5–4 *Massachusetts* majority found that states' procedural rights under the CAA, coupled with their "special position and interest" as quasi-sovereigns, qualified them for "special solicitude" in standing analysis. 549 U.S. at 517–20. Under this more lenient standard, the state plaintiffs only needed to show "some possibility that the requested relief [would] prompt the injury-causing party to reconsider the decision that allegedly harmed [them]." *Id.* at 518. However, *Massachusetts*'s "special solicitude" is inapposite to climate nuisance suits because the nuisance plaintiffs, even if they are states, do not assert a special procedural right as quasi-sovereigns but rather sue under a general public right in a proprietary capacity as landowners. The Second Circuit, recognizing the absence of a special procedural right in *American Electric Power*, accepted *Lujan* for its standing analysis. 582 F.3d at 338–40.

129. 549 U.S. at 526.

granted to quasi-sovereigns by statute.[130] As a result, it is unclear how much the Court's redressability finding relied on the special procedural nature of that case—and as a corollary, how applicable *Massachusetts*'s redressability language is to climate nuisance suits.[131]

This Note accepts that *Massachusetts*'s language about redressability vis-à-vis climate harm itself is persuasive, even if properly classified as dicta.[132] *Massachusetts* does not supercede *Lujan*: the former simply identified the *degree* of relief necessary for finding climate change redressability, while the latter identifies the requisite *likelihood* that granting relief will redress the harm. Section B of this Part proceeds to question the appropriateness of a literal adoption of *Massachusetts*'s redressability standard in nuisance claims. Next, Section C argues that, even adopting a truly literal interpretation of *Massachusetts*, *Lujan*'s requirement that even small amounts of relief be "'likely,' as opposed to merely 'speculative'"[133] still undermines a finding of redressability in a case like *American Electric Power*.

B. *Problems with Line Drawing, Defendant Joining, and Nominal Relief*

Finding the injuries alleged in climate nuisance suits to be redressable with an injunction would render the redressability requirement semantically hollow and practically meaningless, since plaintiffs can gain only nominal relief from the climate harms at hand. Once again, this Note examines *American Electric Power* as a case in point. The plaintiffs' stated injuries in that case are the harmful manifestations of climate change itself, like loss of coastal property. In alleging causation, the plaintiffs claimed that the defendants collectively emit 650 million tons of CO_2 annually.[134] In 2005,[135] global

130. Strictly speaking, the injury in *Massachusetts* was not the harmful manifestation of climate change itself, but rather the improper shirking of EPA duties pursuant to the CAA. *See id.* at 518 (stating that a litigant vested with a procedural right has standing if the requested relief might prompt the agency to reconsider its decision); *id.* at 521 ("EPA's steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts . . . ."); *id.* at 525 (stating that redressability depended on whether the Court had "jurisdiction to decide whether EPA has a duty [to regulate GHGs]"). That is, redressability was satisfied in *Massachusetts* because a decision forcing the EPA to ground its decision in the statute would redress the injury of improper procedural abstention.

131. Technically, since climate harms and emissions reductions were not the case's injury and remedy, respectively, *Massachusetts*'s language about climate harm redressability, 549 U.S. at 524–25, should be dicta.

132. This Note questions the precedential value of *Massachusetts*'s climate harm redressability analysis but will not dismiss it in blanket fashion. Supreme Court precedent cannot be ignored in this context, especially given that the Second Circuit invoked *Massachusetts*'s redressability-specific reasoning in *American Electric Power*. 582 F.3d at 309, 344, 347–49.

133. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).

134. *Am. Elec. Power*, 582 F.3d at 314. The defendants are not alleged to have emitted other kinds of GHGs.

135. The year that the *American Electric Power* complaint was filed. Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

human-related emissions[136] hovered around 55 billion tons.[137] In effect, the plaintiffs alleged that the defendants contributed approximately 1.18% of worldwide anthropogenic GHG emissions.[138] The defendants' 1.18% proportion of worldwide emissions is diminishing and will continue to shrink significantly as developing countries' emissions increase relative to those of the developed world.[139] For relief, the plaintiffs seek an injunction capping the defendants' emissions at some unspecified amount, plus additional yearly reductions.[140] It seems doubtful that any injunction, if granted, would demand more than a 15% emissions reduction.[141] In sum, the most that the

136. These emissions encompass not only fossil fuel use but also other activities such as agriculture and deforestation. This global figure is the relevant one in considering how much an injunction would remedy the plaintiffs' climate injuries because emissions disperse throughout Earth's atmosphere and contribute to a global phenomenon that does not vary with GHG origin. Nordhaus, *supra* note 102, at 30 ("Because global warming is a global public good, the key environmental issue is global emissions . . . . Climate change depends only upon total GHG emissions and the time path of emissions, not on the geographic location of emissions."); IPCC, *Synthesis Report*, *supra* note 1, at 36–37 (considering only global emissions as the driving force behind climate change). Thus, in considering redressability, it does not matter that the defendants produce a larger proportion of *regional* emissions, even if that intuitively seems pertinent to fairness.

137. IPCC, *Synthesis Report*, *supra* note 1, at 36. This figure of 55 billion tons of GHGs measured in equivalent units of CO_2 represents the approximate US-ton equivalent of 50 billion metric tons, which this Note takes as a one-year extrapolation of the billion-tons-added-per-year trend from 2000 (44.7 billion) to 2004 (49 billion). (Note the unit conversion from metric tons: 1 metric ton = 1.1023 US tons.)

138. The 1.18% figure is the defendants' share of emissions (650 million tons of CO_2) divided by global emissions (55 billion tons of CO_2-equivalent). For present purposes, this Note will consider this as equivalent to saying that the defendants caused 1.18% of Earth's current climate change. This assumption is contestable, but the IPCC has concluded with at least 90% certainty that the current phase of climate change cannot be attributed to natural processes. IPCC, *Synthesis Report*, *supra* note 1, at 38–40. In any case, to the extent that climate change *could* be blamed partially on natural processes, doing so would diminish the defendants' proportionate contribution to the harm, thereby strengthening this Part's argument regarding the nominal nature of potential redressability.

139. The Energy Information Administration has projected that whereas US energy-related CO_2 emissions will grow by an average of 0.3% annually from 2006 to 2030, corresponding emissions from developing countries (including, most significantly, China and India) will increase at an average rate of 2.2% annually. ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, INTERNATIONAL ENERGY OUTLOOK 2009, at 111 tbl.15 (2009), *available at* http://www.eia.doe.gov/oiaf/ieo/pdf/0484(2009).pdf. By 2030, developing-world CO_2 emissions will exceed those of the developed world by 77%, whereas in 2006 that number was only 14%. *Id.* at 109. As a proxy for relative US influence, these projections indicate that the *American Electric Power* defendants' causal link to climate change will continue to become even less significant.

140. Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 318 (2d Cir. 2009).

141. In reality, it would probably be less than 15%, considering practicalities such as technological feasibility of meeting short-term energy needs through alternative energies, and the initial price-raising effects (e.g., the financial burden on consumers and resultant political backlash) implied by low-emissions energy mandates. The Regional Greenhouse Gas Initiative, for instance, mandates only a 10% CO_2 emissions reduction below 2009 levels by the year 2018. RGGI CO2 Budget Trading Program, *supra* note 22. A 15% reduction is a conservative estimate for an *American Electric Power* hypothetical. One might then point to the plaintiffs' prayer for subsequent reductions, which could exceed the 15% figure, but those reductions would be more than offset, in the emissions proportionality context, by the developing world's ballooning emissions.

plaintiffs could gain from a favorable decision is less than a 0.2% redress[142]—a figure that will drop farther in the future.

It is unprecedented in public nuisance litigation to entertain a claim that sues for equitable relief from less than 0.2% of the nuisance. This is akin to a nuisance suit against someone who dumps a single can of paint into a river where a dozen factories discharge their waste (statutory preemption issues aside). Another analogy would involve an excessive noise claim where an injunction might make the plaintiff's evenings less than 0.2% quieter. Admittedly, *Massachusetts* undercuts this point, since the climate-harm redress in that case would have been small, too, at a little less than 1%.[143] Crucially, however, the small degree of redress in *Massachusetts* satisfied the majority in part because federal agencies tackle regulatory hurdles incrementally. There, the EPA could acceptably "whittle away" at global warming, refining its approach as it adopts more stringent regulation.[144] Yet in *American Electric Power*—a case between parties in private capacities—the logic of agency experimentation and refining is inapposite. That is, a sub-0.2% causal reduction either redresses the alleged injuries in *American Electric Power* or does not; it would not spur a domino effect of additional redress. Granting relief in nuisance cases could not prompt the defendants in these cases to initiate procedures that could require nationally systemic GHG reductions and transform the federal regulatory paradigm, as in *Massachusetts*. This crucial distinction relates back to the problem of neglecting the procedural nature of the harm and remedy in *Massachusetts*.[145]

Concededly, if we accept *Massachusetts*'s redressability holding to stand for the proposition that *any* slowing of the pace of global warming is a sufficient remedy for Article III purposes, then redressability would be satisfied in *American Electric Power*,[146] provided that an emissions cap on the defendants did indeed reduce overall emissions (an assumption challenged below). In practice, however, such a literal holding would lead to absurd consequences and should not be allowed. At one logical extreme, it would allow a single person to be sued under public nuisance, even if that person's emissions contributed 0.0001% to climate change. After all, an injunction halting John Doe from driving his car to work "would slow the pace of global emissions increases." Yet no one could argue that suing Mr. Doe would "redress" a climate-related harm.

While the single emitter extreme is clearly unacceptable, the idea of joining unrelated emitter upon emitter to a complaint until some magic thre-

142. This figure results from multiplying the defendants' contribution to the harm (1.18%) by the reduction proportion granted by a theoretical injunction (0.15).

143. The Supreme Court in *Massachusetts* noted that the source in question (US motor vehicles) contributed 1.7 billion tons of CO_2, Massachusetts v. EPA, 549 U.S. 497, 524 (2007), or about two and one-half times the amount in *American Electric Power*, *see supra* note 134 and accompanying text. Notably, those emissions would be even less significant in terms of world proportionality given the rise in global emissions since that decision. *See supra* note 139.

144. *See* 549 U.S. at 524.

145. *See supra* notes 130–131 and accompanying text.

146. *See* Borissov, *supra* note 7 at 437–38.

shold of remedial sufficiency is reached also seems unsatisfactory. In *American Electric Power*, the choice of defendants is not accidental; they are all utility companies, and the plaintiffs allege that they comprise "the five largest emitters of carbon dioxide in the United States."[147] Beyond that, however, the defendants are unrelated. For instance, the plaintiffs and defendants are not situated in a single region.[148] Rather, the litigants are scattered throughout the United States, with the opposing parties overlapping geographically in only one state.[149] Allowing such arbitrary joinder of parties (after all, why not add the sixth- through tenth-largest utilities, along with ExxonMobil and other oil and gas giants?) would permit litigants, in tandem with their forum court, to function as a quasi-EPA. In effect, a court could promulgate an emissions standard for as many power plants, oil refineries, and coal mines as could be made party to the lawsuit by the plaintiffs or even by the defendants.[150] This defendant-adding conundrum serves to further distinguish *Massachusetts* and its acceptably small degree of redressability: in that case, redressability was linked to a lone defendant (the EPA), whereas in *American Electric Power*, it is spread over five emitters.

C. *Line Drawing Aside, the Speculative Nature of Relief Should Negate Redressability*

Setting aside line-drawing problems[151] and accepting a minimal-slowing standard for redressability, climate nuisance plaintiffs cannot satisfy *Lujan*'s requirement that relief from the alleged injury be " 'likely,' as opposed to merely 'speculative.' "[152] *Lujan* held that where agency-defendants supplied only a fraction of the funding for projects causing the injury in question, redressability was not met because it was "conjectural whether the

147. Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265, 268 (S.D.N.Y. 2005).

148. Once again, however, even if all the litigants were situated in a single region, that would be beside the point. As much as it might intuitively feel more appropriate to sue emitters within a geographic unit where they contribute much or most of the local emissions, causation of climate change does not turn on emissions' origin. *See supra* note 136 and accompanying text.

149. Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 331–32 (2005) (noting that only one power plant from one of the defendants is located in one of the plaintiff states); *see also supra* note 27.

150. With *American Electric Power* proceeding to the merits, it will be interesting to see if the defendants—not wanting to suffer injunctive caps that do not burden their competitors—can successfully seek to join other utilities or any other emitters as third-party defendants. *See* Friendswood Dev. Co. v. Smith-Southwest Indus., 576 S.W.2d 21 (Tex. 1978) (permitting a development company—sued for nuisance and negligence by landowners who alleged that the company's extraction of groundwater caused subsidence of their lands—to join as third-party defendants numerous other parties alleged to be withdrawing groundwater from the same general area). If so, concerns about this kind of line drawing would be heightened even more.

151. Judges are line drawers, after all. The preceding discussion simply stresses that calling the harms in *American Electric Power* "redressed" would constitute such a semantic stretch—considering both the practically meaningless level of relief and the arbitrariness of defendant joining—as to merit serious reflection about what limits, if any, we will recognize with respect to standing in this context.

152. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

nonagency activity that affect[ed the plaintiffs would] be altered or affected" by enjoining the agency.[153] In other words, it was uncertain whether the plaintiffs' harm would subside as a result of the prayed-for relief, since the injurious projects may have continued even without the defendants' funding. The claim was therefore nonredressable, so the plaintiffs lacked standing. *Lujan*'s holding that uncertainty of relief can defeat standing applies to cases like *American Electric Power* because aggregate emissions would remain unaffected if the defendants' present customers switch to uncapped GHG-producing energy sources.

Capping the emissions of just a few, albeit massive, utilities can offer only a speculative reduction in net GHG emissions, given the shifts in energy consumption liable to result from consumers shunning higher energy prices.[154] First, in places where competition exists between utilities, present consumers of capped utilities would be impelled to switch to purchasing from uncapped utilities because those unconstrained competitors could offer cheaper energy. Second, in places where a capped utility monopolizes the local power market, the aforementioned economic incentive (i.e., the draw towards cheaper, dirtier power) would tend to push current and prospective consumers of capped utilities into locations with uncapped utilities. This second dynamic, sometimes called "leakage," is especially crucial in the industrial context due to businesses' relative mobility, the great proportion of emissions they contribute, and their tendency to relocate where production is cheapest (including overseas).[155] Ultimately, since consumers would gravitate towards uncapped power sources, aggregate emissions might not decrease, although the defendants' role in creating them would. Accordingly, the same (or conceivably greater) overall contribution to climate change would ensue, and the plaintiffs' injuries would not be redressed at all. At best, then, the chance of redress is conjectural.

---

153. *Id.* at 571.

154. To satisfy an injunction, a capped emitter would have to choose between generating less power with current technologies or implementing costly technologies to produce fewer emissions per unit of energy (or some combination of the two). Either method would raise prices: the former because diminished supply results in higher prices (assuming constant or growing demand); the latter because increased production costs are passed along to consumers. A third option for a capped defendant would be to purchase energy from cleaner sources and sell it to consumers—but this would just make it a middleman peddler of already more expensive clean energy. *See* Jay B. Wiley, *Cap-and-Trade Spells Economic Disaster for America's Poor*, 12 SCHOLAR 267, 278–84 (2010) (acknowledging the upward price pressures imposed by emissions caps under cap-and-trade—essentially a nationwide emissions cap that imbues the same effect on energy prices as would an injunction); *see also* Michael Shellenberger et al., *Fast, Clean, & Cheap: Cutting Global Warming's Gordian Knot*, 2 HARV. L. & POL'Y REV. 93, 100–17 (2008).

155. Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PA. L. REV. 1961, 1967–73 (2007) (detailing how geographically circumscribed emissions caps can induce perverse results with leakage). For reference, in 2008 the commercial and industrial sectors consumed about 63 percent of the electricity of America (36 and 27 percent, respectively). ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, ANNUAL ENERGY REVIEW 2008, at 259 tbl.8.9, *available at* http://www.eia.doe.gov/emeu/aer/. In addition to the leakage phenomenon, with respect to households in particular, those who remain in capped monopolized zones could choose to supplement their energy consumption with power from other GHG-producing sources—such as propane, wood, and other combustibles—for heating and cooking needs.

Unless the defendants' consumers were somehow precluded from acquiring energy from non-party competitors or other power sources—whether those consumers relocate or remain in place—climate nuisance plaintiffs cannot show beyond a speculative level that capping several defendants' emissions would translate into any slowing or reduction of climate change, given the possibility of energy source substitution or supplementation.[156] This proves fatal to plaintiffs' standing, regardless of line-drawing problems with potential relief levels and defendant joining.

CONCLUSION

The future of the *American Electric Power* controversy and climate change tort litigation is unclear. In *American Electric Power*, the district court must now proceed to the merits of the claim, where at least two equitable arguments—besides causation apportionment difficulties—militate against the plaintiffs. First, the "clean hands" doctrine[157] undermines the claims, since the plaintiffs directly consume the defendants' product (energy) and thus comprise an essential component of the very emissions stream that causes climate change.[158] The defendants ultimately fuel their own injury; therefore they lack clean hands to complain about the process.[159] Moreover, the "balancing of equities" doctrine[160] could be problematic for the plaintiffs, given the de minimis benefit that they would

---

156. The plaintiffs, invoking federal jurisdiction, bear the burden of establishing the elements of Article III standing. *Lujan*, 504 U.S. at 560–61.

157. Under this doctrine, plaintiffs who are at least partly responsible for the harm in question are barred from seeking an injunction against it. *See* RESTATEMENT (SECOND) OF TORTS § 941 cmt. b ("Insofar as one of the parties is responsible for the particular hardship factor in the situation, this is an element weighing against that party."). This principle, grounded in fairness concerns as well as incentives considerations, is theoretically comparable to the contributory negligence and "coming-to-the-nuisance" doctrines.

158. After all, while the defendants can invest in cleaner forms of energy generation, the plaintiffs can just as well demand less of the defendants' product and achieve the same relief by, for example, decreasing power-consuming activities or making public facilities more energy efficient—probably at a lower net cost. *See* Kate Gilbraith, *McKinsey Report Cites $1.2 Trillion in Potential Savings From Energy Efficiency*, N.Y. TIMES (July 29, 2009, 11:26 AM), http://greeninc.blogs.nytimes.com/2009/07/29/mckinsey-report-cites-12-trillion-in-potential-savings-from-energy-efficiency/ (reporting a study showing that the United States could save $1.2 trillion through 2020 by investing $520 billion in energy efficiency); FLANNERY, *supra* note 3 at 302–06 (hailing energy efficiency and conservation measures as an immediate means of reducing GHG emissions). Emissions are generated by and on behalf of many groups—from "upstream" extractors of fossil fuels, to middlemen convertors of them (utilities and refineries), to "downstream" businesses, households, and individuals who ultimately consume the energy—so it is illogical and unjust to assign fault to any one segment for the collective resultant harm.

159. This Note does not consider whether middleman defendants like those in *American Electric Power* might, if climate nuisance actions proceed, implead actors from other segments or seek indemnification from them, given the interrelation of emissions liability. This possibility seems worthy of attention if climate litigation proceeds.

160. Under this doctrine, courts consider the "relative hardship" between the plaintiff and the defendant in deciding whether to grant injunctive relief. RESTATEMENT (SECOND) OF TORTS § 941 cmt. c ("The law expresses a compromise between the conflicting interests of neighbors, in which many harms must be borne as incidents of communal life.").

receive[161] compared to the significant burden that an injunction—which would require either a transformation of energy-generating infrastructure or a costly acquisition of supplemental energy from cleaner sources in order to maintain energy supplies—would place on the defendants.[162] These arguments are not exhaustive, of course; other defenses on the merits may also foil the plaintiffs' public nuisance claim.[163]

From a policy standpoint, it is worth recognizing that this litigation may be meant more to prompt the federal government to regulate GHG emissions than to gain relief from the enjoinment of the specific defendants. Sometimes, the judiciary prudently pushes the other branches when they seem deadlocked and when society appears ripe to embrace progressive change, as they did in *Brown v. Board of Education*.[164] However, *American Electric Power* does not present a *Brown*-like situation where such judicial pushing is appropriate. Whereas cognizing and suggesting a nondiscriminatory standard for equal protection violations of racial segregation required constitutional expertise—quintessentially within the judiciary's purview—adjudicating climate claims calls for complex scientific and economic judgments. Additionally, besides wasting judicial resources and legitimacy, there is valid concern that climate torts could frustrate the fomentation of more holistic, legislative reform if lawmakers were to become complacent because they think the courts are dealing with it.

One more concern is that, if successful, the state plaintiffs in *American Electric Power* will effectively avoid political accountability by using the less efficient, less fair means of litigation, as opposed to the more direct means of legislation, to push low-emissions energy. In either case—judicial enforcement of emissions reduction or legislative incentivization of it through tax or cap-and-trade programs, increased funding for public transportation, etc.—emissions theoretically diminish, increasing energy prices in the short run. The lawsuit avenue, however, implicitly pins the blame for the resultant cost increases on the utilities, not the elected officials. With litigation, legislators would not have to face their constituencies and declare that they have decided to combat climate change by imposing laws that make GHG emissions—and therefore energy production as a whole—more expensive. Lawsuit-spurred constraints on emissions still make energy more costly, just like legislation, with states ultimately propelling the dynamic by virtue of bringing the claims. However, litigation makes defendant-emitters the culprits of the price hikes. After all, the impartial judiciary would have

---

161. *See supra* Section III.B.

162. *Cf.* Boomer v. Atl. Cement Co., 257 N.E.2d 870, 873 (1970) (granting an injunction conditioned on payment of damages rather than a permanent injunction, where a cement plant caused a nuisance valued at $185,000 to nearby residents and shutting down the plant would have resulted in a loss of $45 million and 30 jobs); Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109 (Okla. 1962) (refusing, in a contract action, to grant an injunction where specific performance of a clean-up contract would have cost $29,000 but yielded a mere $300 benefit).

163. *E.g.*, Biber, *supra* note 93, at 1306–08 (noting three challenges to proving causation that relate to the delayed nature of climate harms).

164. 347 U.S. 483 (1954).

pointed its authoritative finger at the defendants and pronounced them liable. Further, as the proverbial "bad guys," corporate emitters are easily assigned fault. Clean energy is a crucial, urgent, difficult prerogative, and power producers must play a key role in promoting it. But governmental shirking of transparent ownership of the process through less efficient, less fair means of redress is irresponsible. Rather, states should stick to legislation and regulatory incentives to achieve the same ends.

At some point, regulation of GHGs under the CAA or some new federal law could preempt climate nuisance claims, perhaps within a year or two. Until such time, however, parties to pending climate suits, potential litigants, and energy consumers are sure to keep an eye on *American Electric Power*,[165] given the precedential importance of the case, the tremendous amount of corporate liability at stake, and the possible bearing on energy prices.

The political question doctrine should extend to bar adjudication of climate-related public nuisance claims seeking injunctive emissions caps, given the lack of judicially manageable standards and the unavoidability of making initial policy determinations reserved for the political branches in this novel stretch of nuisance theory. Moreover, such suits should not pass Article III standing scrutiny, for redressability is lacking in light of the speculative, at-best nominal relief from climate harms that emissions caps would offer. Assuming adjudication on the merits of the case, equitable relief principles and political policy considerations further militate against granting relief. Climate change awareness and energy reform deserve serious, imminent, comprehensive action from the international community, Congress, the executive branch, and state and local governments. These vital ends, however, cannot be pursued through private tort litigation in a manner that is constitutionally prudential, efficient, fair, or effective.

165. The Second Circuit declined to rehear en banc the appeal of the district court's decision in *American Electric Power*, though the defendants have moved to stay the appellate court's remand pending an application for certiorari to the Supreme Court. Brian Hansen, *Utilities petition Supreme Court to overturn court ruling on CO2 as a public nuisance*, GLOBAL POWER REPORT, Mar. 18, 2010, *available at* 2010 WLNR 6750666. Meanwhile, the Fifth Circuit will rehear en banc the appeal of *Comer*, Comer v. Murphy Oil USA, 598 F.3d 208 (5th Cir. 2010), and the plaintiffs in *Kivalina* have appealed the dismissal of their case to the Ninth Circuit, Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009), *appeal filed*, No. 09-17490 (9th Cir. Nov. 5, 2009).